No. 14,959

In the

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD., a corporation,
Appellant,

vs.

MARINE TERMINALS CORP., a corporation,
Appellee.

Appellant's Closing Brief

Appeal from the United States District Court for the Northern District of California, Southern Division

---

EDWIN L. GERHARDT
GORDON L. POOLE
LILLICK, GEARY, WHEAT, ADAMS & CHARLES
311 California Street
San Francisco, California

Attorneys for Appellant

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

TABLE OF AUTHORITIES CITED

RULES

TEXTS

No. 14,959

In the

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD., a corporation,
Appellant,

vs.

MARINE TERMINALS CORP., a corporation,
Appellee.

Appellant's Closing Brief

Appeal from the United States District Court for the Northern District of California, Southern Division

---

STATEMENT OF FACTS

The evidence and testimony produced at the trial by each side, as to the facts of the accident was not substantially controverted. Appellee apparently has no real quarrel with appellant's statement of facts. Appellee merely sets forth a condensed version of the evidence eliminating the facts bearing upon its own negligence and adding certain inferences and conclusions which have no place in the statement of facts.

I.

INDEMNITY ALLOWED FOR BREACH OF STEVEDORE'S CONTRACTUAL OBLIGATION TO PERFORM WORK SAFELY

Appellant's Specification of Error No. 1

THE RYAN CASE

(*Ryan Stevedoring Co. v. Pan-Atlantic SS. Corp.*, ... U.S. ..... 100 L.ed (Advance) page 146)

Appellee's reply brief concedes as it must that under the *Ryan* case a breach of contract to perform work safely requires indemnity. We have such a contract in the present case where the duty to perform work properly and to remove hatches and beams was expressly assumed.

Appellee contends, however, the *Ryan* case does not apply because its facts are different. Appellee purports to distinguish the *Ryan* case on several grounds, none of which bear up under analysis:

The fact that the *Ryan* case involves cargo and the present case an item of ship's equipment is of no moment. It is the breach of the stevedore's contractual duty which is the crucial issue. For appellee to continue, knowingly, with its work in the face of a known unsafe condition was clearly a violation of its duty to perform work safely and efficiently. This is equivalent to stevedore's breach of duty in the *Ryan* case to load and unload the vessel properly and safely.

Nor can the *Ryan* case be distinguished on the grounds that it was a case involving "mere unseaworthiness". A careful reading of that case fails to unearth any indication that the court considered whether the Pan-Atlantic vessel was unseaworthy or there was negligence. The longshoreman's suit against the shipowner was tried (and won) on the theory that *either* the vessel was unseaworthy or that shipowner was negligent in failing to furnish a safe place

to work. In the action over for indemnity, the Supreme Court did not identify the nature of the shipowner's liability to the longshoreman. It was not compelled to do so in view of the contractual breach by the stevedore.

Lastly, appellee contends that our interpretation of *Ryan* imposes indemnity irrespective of the participation by the shipowner. This is not true. If *Ryan* means what it says—and we believe it does—the test is whether there has been a breach of the stevedore contract. Indemnity does not follow every accident, but depends upon whether there is a breach of the stevedore's obligation to perform its work properly, efficiently and safely.

It is not correct to assert, as does appellee (Reply Br. p. 11), that *American Mutual Liability Ins. Co. v. Matthews,* 182 F.(2) 322 (2nd Cir. 1950) supplements or alters the rule enunciated in *Ryan.* The *American Mutual* case deals with the right of contribution, not indemnity. In its opinion, it is true the court remarked that there was no implied promise to detect a defect in equipment supplied by the vessel. Here however the stevedore discovered the dangerous condition, yet ignored the dangers created thereby. We do not deal here with a stevedore who had no implied obligation to inspect as in *American Mutual,* but with an express warranty of the stevedore to perform its work properly and efficiently, and to remove beams.

If appellee's contention (Reply Br. p. 12) is that the *Matthews* case requires an express covenant of indemnity to protect the shipowner from its own negligence, it is clear that the *Ryan* case has changed that requirement. We believe that the shift in emphasis by the *Ryan* case to the terms of the stevedore contract and the breach thereof by the stevedore is a substantial change from the cases which preceded it. The Supreme Court language quoted in our opening brief so indicates.

II.

INDEMNITY ALSO ALLOWED WHERE VESSEL UNSEAWORTHY AND STEVEDORE SOLELY NEGLIGENT

Specification of Error No. 2

Even if we disregard the *Ryan* type of contractual indemnity, and look only to the alleged tortious fault of each party, we find here a clear case for indemnity.

Based upon the discovery of the missing latch made by the longshoremen before the accident, we have stipulated the ship was unseaworthy (TR. 168, 256, 257). But this was not a stipulation that the plaintiff knew of the missing latch (TR. 103), nor can it be inferred therefrom that appellant was negligent. There was no evidence to support a finding that appellant was negligent.

There are no less than five references in appellee's reply brief (pp. 2, 10, 12, 13 and 34) to the assertion that the shipowner "knowingly supplied" the defective hatch-beam. There is not one bit of testimony to support this assertion, and it is on this ground alone that appellee attributes negligence to the vessel. The transcript reference cited by appellee for this erroneous conclusion is p. 289. The Chief Officer's words, as testified to by appellee's walking boss were:

> "Will you keep your eyes open? I believe I have strongbacks which have no locks."

It is from these words that appellee seeeks to show the vessel's knowledge of the defect in the particular beam in question. Appellee has shown, and can show, no other relevant transcript reference. But these words cannot be interpreted to mean more than they say. This is no acknowledgment that No. 2 strongback in the No. 1 lower 'tween deck lacked a locking device. Nothing is stated more than a belief that some beams aboard might have no locks. Appel-

lee recognizes this in its Statement of Facts (Reply Brief p. 2) as follows:

> "It is undisputed that the mate of the vessel did not specifically call attention to or point out any particular beams which lacked locking or safety devices."

Specification of Error No. 3

Appellee asserts that our specification of error No. 3 directed to Finding of Fact No. 8, "is fully answered by the uncontradicted testimony of Mr. Pacquette" discussed on p. 3 of their reply brief. We note that appellee avoids, in this discussion, the point that Pacquette disapproved of having only one section removed (TR. pp. 156-159), and that his normal practice as winch driver (contrary to his practice on the day of the accident) was to leave enough room for the traveling hook, so that no obstruction would be presented to it (TR. 157, 158, 159). Nor has appellee chosen to discuss the action of Pacquette in raising the hook before it was steadied by Williams (TR. 156, 54-5, 83). Based on the foregoing, Finding of Fact No. 8 that Pacquette was free of negligence is not supported by, and is contrary to, the evidence.

Specifications of Errors No. 4 and No. 5

Appellee assiduously avoids, throughout the brief, a discussion of the negligence of its employees. We don't blame them. The nature and extent of their negligent and reckless conduct is not controverted. The undisputed facts are these: Their tortious conduct consisted of continuing stevedoring operations under a known dangerous condition, after they knew the specific lock was missing from the beam; (TR. 115-116, 117-121, 135) in placing men under the defective beam when they knew the bridle and hook would, in the

normal course of its movement, strike that beam; in failing to stop work until the condition could be corrected or remedied (TR. 178-179); in failing to utilize some ten to fifteen minutes to remove the defective beam as required by the provisions of the Maritime Safety Code, and by the terms of the stevedore contract under which the work was performed (TR. 125, 126, 161, Ex. 16, Ex. 18).

The argument directed to specifications of errors 4 and 5 and elsewhere with relation to the stevedore's negligence is not dependent upon a breach of the Maritime Safety Code. Appellant's suggested finding of fact relating to the breach of the Maritime Safety Code would have more clearly demonstrated the violation by appellee of the standards imposed by the industry for "proper and efficient" conduct of the work which appellee was obliged to perform under the stevedore contract.

Specification of Error No. 6

It is our position that the court erred in not finding that the injuries sustained by the longshoreman resulted from appellant shipowner's breach of its non-delegable duty to furnish the longshoreman a seaworthy ship and from appellee stevedore's sole negligence. Appellee concedes, as it must, that where the sole negligence or primary cause of the accident is attributable to the stevedore, indemnity is allowed (Reply Brief p. 15). Appellee states that the feature of this case taking it out of this accepted rule is the fact that the vessel knowingly supplied defective gear, but there is no evidence to support the argument that the defective beam was knowingly furnished (see p. 4 this brief). Even if it can be argued that the vessel knowingly furnished a hatch beam without locking devices, appellee ignores the effect of *Berti v. Compagnie, etc.,* 213 F.2d 397

(2d Cir. 1954) and *Crawford v. Pope & Talbot, Inc.,* 206 F.2d 784 (3rd Cir. 1953), where the stevedore, aware of the defective nature of the ship's equipment failed to take proper precautions.

In the *Crawford* case the shipowner supplied a defective lighting system. The evidence showed that this inadequacy had been known to the ship for forty-eight hours before the accident in which a maritime worker fell in the dark. The court based liability of the shipowner to the employee solely on the ground of unseaworthiness. In the subsequent action for indemnity the court ruled that, with these facts before it, together with the negligence of the employer, the shipowner might well have a cause of action over against the employer.

III.

ALTERNATIVELY NEGLIGENCE OF SHIPOWNER DOES NOT BAR INDEMNITY WHERE STEVEDORE'S NEGLIGENCE ACTIVE AND PRIMARY.

Specifications of Errors Nos. 7, 8 and 9

Negligence of appellant was not proven at the trial but even if appellant was guilty of some negligence, it was of the passive or secondary sort—the negligence of the stevedore was the active primary and proximate cause.

Let us assume, although it is contrary to the evidence, that appellant had specific knowledge relating to the #2 hatch-beam—and further that the Chief Officer called the stevedore's attention to this particular defective beam; that instead of being merely unseaworthiness—it is a case of actual negligence. Even if these facts are assumed indemnity is not foreclosed for such negligence of the shipowner is passive and in view of the undisputed negligent and reckless conduct of the stevedore in continuing with knowledge of the danger, the stevedore's negligence was the active, primary and proximate cause.

Appellant does not really meet the issues raised by this argument, except by reiteration (sometimes in italics) of the lower court's conclusions of law referring to joint and concurring negligence. Reduced to its bare outlines appellee's argument is that there was joint and current negligence because the trial court says there was joint and concurrent negligence. This circular argument is made without any supporting references to the transcript. Such supporting references cannot be furnished because there is no evidence or finding of fact supporting the conclusions of joint and concurrent negligence.

We believe appellant's cases and Law Review article have not been overcome by the arguments on pages 18 through 21 of appellees' reply brief and that our authorities stand up under analysis. These authorities support a claim for indemnity in cases of shipowner's passive negligence as well as cases of unseaworthiness.

IV.

A. PRINCIPLES OF CASES RELIED UPON BY TRIAL COURT

Specification of Error No. 10

Appellee states that the argument in our opening brief (Sec. IV, pp. 35-38) is difficult to follow. The point we made, or tried to make was this: there are numerous cases (discussed in our opening brief pp. 27-35, Sec. III) decided before the *Ryan* case which have generally recognized indemnity in active-passive tort cases when a contractual relationship existed between the tortfeasors. Unlike the *Ryan* case, which specifically refrained from discussion of the comparative faults of the indemnitee and indemnitor, these earlier cases proceeded on the theory that once the contractual relationship was established the fault of each should be considered in comparative terms. These discus-

sions generally were in terms of passive and active negligence and permitted a passive tortfeasor to recover indemnity from the active tortfeasor. In the argument on Specification 10 in our opening brief, we tried to point out that *Halcyon Lines v. Haenn Ship Refitting Corp.*, 342 U.S. 282 (1953) did not alter these principles because *Halcyon* was a case of contribution only; that *American Mutual* did not apply because it was a contribution case with no contractual duty violated and that *States SS Co. v. Rothschild Int. Stev. Co.*, 205 F.2d 253 (9th Cir. 1953) did not apply because there was no contract whatsoever between the shipowner and stevedore.

As we pointed out above there are numerous cases many of which were decided in the Third Circuit holding that once the contractual relationship between the shipowner and stevedore is established indemnity hinges upon shipowner's passive and stevedore's active negligence. Other cases, notably *United States v. Rothschild Int. Stev. Company,* 183 F.2d 181 (9th Cir. 1950), decided the question of indemnity in terms of active and passive negligence without reference to a contractual relationship, although such a contract might have been present. *States SS Co. v. Rothschild,* supra, stands for the proposition that in the absence of contractual relations between the putative indemnitor and indemnitee something more than active or passive negligence must be shown, e.g. the indemnitee must be liable without fault as the result of the sole negligence of the indemnitor. In other words, absent the contractual relation, indemnity is allowed only where the ship is unseaworthy, and the stevedore is solely negligent. But the *States* case expressly distinguished those cases where (1) there is an express contractual indemnity provision or (2) a contract existed between the shipowner and stevedore

from which indemnity can be inferred. Thus the *States* case does not foreclose recovery in indemnity where as here there is a contractual relation and active negligence of the stevedore with passive negligence of the shipowner. Viewed in this light the *States* case together with *Slattery v. Marra Bros.,* 186 F.2d 134 (2nd Cir. 1951) and *American Mutual v. Matthews,* supra, are fully in line with *U. S. v. Arrow Stev. Co.,* 175 F.2d 329 (9th Cir. 1949) and *U. S. v. Rothschild,* supra.

Appellee has set forth a series of cases which, it contends, supports the court below. We believe these cases are distinguishable as follows and, in some instances do not properly set forth the law of indemnity as it is presently applied by the courts.

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). This case stands for the proposition that the shipowner's obligation to provide a seaworthy vessel extends to longshoremen, and this appears to be the only purpose for which it was cited by the court below. The issue of indemnity was not there involved.

Johnson v. U. S., 79 F. Supp 448 (D.C. Ore. 1948). This case involves simply the legal proposition that the Longshoremen's and Harbor Workers' Compensation Act bars a shipowner's suit for *contribution* against the harbor worker's employer. This case merely anticipated the Halcyon case and by no means foreclosed the right to *indemnity* under appropriate circumstances under the *U. S. v. Rothschild* supra and *Ryan* supra cases, which came subsequently.

American Mutual v. Matthews, supra. We dealt with this case at some length in our opening brief (pp. 36-37). We pointed out there that that case involved contribution, not indemnity. The court properly pointed with approval to cases in which indemnity was permitted for breach of a

contractual duty to do the work properly. The court found no breach for failure to discover a defect in the rope. Had the stevedore there discovered the defect, appreciated the danger caused thereby, and yet used the rope, causing an accident, the facts of that case would have been comparable to the factual issues before this court. There is reason to believe that, had the court in *American Mutual* had before it the question of indemnity, and the contractual obligation of the stevedore to perform its work properly, the decision would have been for the shipowner.

Slattery v. Marra Bros. supra. This case has been referred to more than once in support of the trial court's decision, but it is distinguishable because there was no contract of any sort between the two parties. It involved a suit by an employee against Marra for personal injuries resulting from the latter's negligent maintenance of a door on a pier upon which the employee was working. A door adjacent to the work area in which longshoremen were working dropped upon the employee. Marra, lessee of the pier, was sued by the longshoreman employee; Marra in turn filed a third party complaint against the stevedore employer. The facts of the case disclosed that the dangerous condition of the door was not readily apparent to the longshoremen working on the pier. It is important to note that Marra had no contractual relationship with the employer. There the court pointed out that assuming both tortfeasors are liable to the injured person, the difference in the gravity of the faults may throw the entire loss upon one. But since the employer was not liable to his employee under the New Jersey Compensation Act, no such indemnity could be found absent some other legal transaction between them. In our case, the necessary legal transaction has been

supplied—the stevedore contract in force between appellant and appellee (Ex. 16).

Hawn v. Pope & Talbot, Inc., 198 F.2d 800 (3rd Cir. 1952). It is important to note that in this case the court had before it a jury verdict finding both the stevedore and shipowner negligent. The jury did not characterize the negligence of either, so the court concluded that without a finding of secondary or passive negligence on the part of the shipowner and primary negligence on the part of the stevedore, no indemnity could be allowed. Factually also the case is dissimilar to the case here at issue, for the court there noted that the stevedore conducted no activity, and appeared to have no part in the condition which led to the accident. It is important also that in the Hawn case there was no contractual relationship between the employer and the shipowner.

Shannon v. U. S., 119 F. Supp. 706 (S.D. N.Y. 1953). There the sole determining factor is a comparison of fault between shipowner and stevedore without any reference to stevedore's contractual relationship. The court in the Shannon case merely found no duty on the part of the stevedore to inspect the cable before using it. Contrast the situation here, where the defective beam was discovered by the stevedore and work continued contrary to all safety rules and the contract in the face of the known dangerous condition.

Union Sulphur & Oil Co. v. Jones & Son, 195 F.2d 93 (9th Cir. 1952). Appellee devotes no less than five pages to extended discussion of the *Union Sulphur* case. It is apparent from the facts disclosed (Reply Brief pp. 25-30) that the vessel was unseaworthy by virtue of a defective weld, not apparent to the stevedore upon visual inspection. In the present case, the defect was known to stevedore appellee, commented upon and ignored by appellee, although the

danger created thereby was accurately apprehended. While t was not "good stevedoring practice" to operate the clam shell bucket by drag lines attached to the ladder in the *Union Sulphur* case, it was negligence of the grossest sort o perform stevedoring operations here under the known defective beam. It is noteworthy that the court in Union Sulphur in affirming a flat finding of joint and concurrent negligence, nevertheless recognizes that if there had been sole, active, or primary, negligence attributable to the stevedore, indemnity would have been permitted. Thus recovery should be permitted here where the shipowners negligence f any, was only passive (Fdg. No. 12 Tr. 34).

It is our position that in order to find liability of the appellee here, the Court need not go beyond a finding of passive negligence on the part of appellant and primary or active negligence on the part of appellee. This rule is supported in Sec. 97 of the Restatement of Restitution and in he other cases cited in Sec. III on pages 30 and 31 of our opening brief.

3. STEVEDORE'S NEGLIGENCE NOT ONLY ACTIVE—WHICH ALONE PERMITS INDEMNITY, BUT WAS ALSO SUPERVENING

Appellee's question "Was one wrong completed and a new supervening cause added?" has to be answered in the affirmative.

Assuming both parties were negligent, it is not necessary o show that one party's negligence was a superseding ause. To show active or primary negligence is sufficient.

Yet even if the court is obliged to examine the faults of each in terms of superseding cause—which we do not believe t has to do—it will be found that the stevedore's negligence was not only active and primary—it was also superseding.

In our opening brief, we referred to the case of *The Mars*, 9 F.2d 183 (S.D. N.Y. 1914) Judge Learned Hand's comments in that case have relevance to the issues before this court, where he said, at page 184:

> "A great deal has been written about reasonable and proximate consequence, and for myself I have never had much enlightenment, except on this which seems to me is the only intelligible line of decision: What would an ordinary man expect, under all the circumstances, to be the result? If something supervenes which nobody would expect and no one had a right to expect, I think the authorities hold, or should be interpreted at least as holding that this is not attributable to the wrongdoer. . . . I agree that the fact that a subsequent piece of carelessness intervenes, does not necessarily remove responsibility from the wrongdoer, but I do think that a man is entitled to suppose that, in loading a barge some examination will be made after so evident and obvious a collision as this. . . ."

Let us re-examine the facts before this Court in light of *The Mars*. A particular beam on the vessel had a missing lock. But this situation was harmless in itself. It became dangerous in the light of stevedoring operations conducted in No. 1 hold. The shipowner, believing that some locks were missing, warned the stevedore to be careful (Tr. 289). It would appear that the shipowner is entitled to at least some reliance upon the contract to perform work properly and on the safety rules under which the longshoremen worked and by which they were required specifically to insure that work would not proceed in the hatches underneath unlocked beams (Tr. 125, 182, 282, 287, Ex. 16). It was shown that a missing lock is immediately evident once the hatch boards adjacent to it are removed. Edward Randolph appellee's employee discovered it immediately (Tr.

3-116) and it was "in fact his business to see that it" was ken off (Tr. 292). Only the longshoremen conducted any tivity in this area. No ship's personnel were seen there Tr. 81, 82, 166, 167, 189). Could the shipowner anticipate at the stevedores having found an obviously defective am with a lock missing, and with the bridle and hook riking this beam when being hoisted from the hold, would ntinue to work their men in a lower hold immediately derneath that beam? The failure of the longshoremen to move the beam or to suspend operations in the face of is danger is the crucial factor. They, not the shipowner, mpted fate, and the inevitable occurred.

The quotation in appellee's reply brief (p. 30-31) from ction 441(d) of the Restatement of Torts is revealing, for order to be a concurring cause, "the effects of the negli- nt conduct of both the actor and the third person must be active and substantially simultaneous operation". See so *Section 439*. But, as we pointed out above, whatever rong had been done by the shipowner was completed be- re the longshoremen assumed the responsibility for steve- ring operations.

Appellee asserts that the six criteria for superseding use must be met (Section 442, Restatement of Torts), guing these criteria were not met because the trial court ade a "finding" of joint and concurrent negligence. In the st place, there is no such finding. The phrase appears ly as a conclusion of law, and the conclusion of law is in way supported by evidentiary facts. Appellee is in the rious position of citing the Restatement to support pur- rted conclusions of law which are not supported either the findings of fact or by the evidence. Actually, we be- ve that upon proper analysis, the above section from the

Restatement supports a conclusion of superseding cause.

It may well be that comment c(g) of Section 447 of the Restatement of Torts suggests not only the key to the issue of superseding cause, but an additional basis on which indemnity should be granted in this case.

> "While the fact that such an intervening act of a third person is negligent does not prevent the actor's negligent conduct from being the legal cause of the harm resulting therefrom to another, the negligence of the act may be so great or *the third person's conduct so reckless* as to make it appear an extraordinary response to the situation created by the actor and therefore a superseding cause of the other's harm." (Italics ours.)

The cases cited by the appellee on the issue of superseding cause are not really in substantial discord with the views expressed above, for appellee's cases cannot really be understood without reference to the factual basis for the court's conclusions. *Mosley v. Arden Farms,* 26 C.2d 213, 157 P 2d 372 (1945); *Werkman v. Howard Zinc Corp.,* 97 CA 2d 418, 218 P 2d 43 (1950) and *Slattery v. Marra* supra are all distinguishable on the ground that the activities of the second tortfeasor did not involve appreciation of known dangers and the callous disregard of such dangers, inviting disaster. The first two cases and section 452 from the Restatement of Torts do not involve indemnity at all. They involve breach of duty owed to the innocent third party, not the breach of duty owed by the second tortfeasor (in this case, the stevedore) to the original actor (the shipowner). The *Slattery Case* merely forecloses indemnity in the absence of a contractual relationship.

V.

EVIEW OF CONFLICTING FINDINGS OF FACT AND CONCLUSIONS OF LAW

pecifications of Errors Nos. 11, 12, 13, 14 and 15

Appellee devotes a paragraph on page 21 and Section D, p. 33-36 to the contention that the findings of fact and onclusions of law are supported by the evidence, are consistent, and support the judgment of the trial court.

We should point out that, so far as the issues now before his court are concerned, there is, practically speaking, no ispute of fact. This unique situation occurred primarily ecause the entire evidence relating to the factual issues of ability comes either from documentary evidence or from stimony of appellee's employees, for they were the only nes present in the area, the only people who could testify the circumstances surrounding the accident.

Appellee has cited a number of cases dealing with the roposition set forth in Rule 52(a) Federal Rules of Civil rocedure, to the effect that the findings of fact by the trial ourt will not be set aside unless clearly erroneous, and due egard shall be given to the opportunity of the trial court judge the credibility of the witnesses. This is the effect all cases cited on pages 21 and 36 of the appellee's brief. bviously, in the application of this rule, the courts have esitated to resolve conflicts of testimony, emphasizing the nportance of the trial judge's opportunity to pass on redibility. Even so, however, such findings are never conusive, and even where there is evidence to support them, ney are "clearly erroneous" when, upon review of the ntire evidence, the court is left with the definite and firm onviction that a mistake has been made.

Smyth v. Barneson, 181 F.2d 143 (9th Cir. 1950);

Grace Bros. v. Commissioner of Internal Revenue, 173 F.2d 170 (9th Cir. 1949).

And where, as here, the primary or evidentiary facts are not disputed and there is no real conflict in the evidence, the courts' conclusions or inferences drawn from those facts are not subject to the restrictions imposed upon the reviewing court by Rule 52(a), for the reviewing court is in as good a position to make such conclusions or inferences as the trial court.

Stevenot v. Norberg, 210 F.2d 615 (9th Cir. 1954);
Home Indemnity Co. of N. Y. v. Standard Accident Ins. Co., 167 F.2d 919.

Our specifications of errors Nos. 11, 12, 13, 14 and 15 concern erroneous conclusions of the trial court that both parties were jointly and concurrently negligent.

We pointed out first that such conclusions were not supported by the evidence and in fact were contrary to the evidence. To refute this argument, appellee returns, as in other passages of his brief, to page 289 of the transcript. Concurrent negligence on the part of the shipowner is said by appellee to hinge upon a finding that the vessel knowingly supplied an unseaworthy beam (Reply Brief p. 34). No one contends that the Chief Officer said other than what Bleile says he did, but as we have indicated in earlier portions of this brief, there is no support in the evidence for the assertion that the absence of locking devices on No. 2 beam was known to the shipowner. And even if the shipowner did have such knowledge there is no basis for the conclusion that it was jointly or concurrently negligent in light of the stevedore's negligence.

There is yet a further fundamental error in the findings and conclusions. They are clearly contradictory. The court below, in considering the evidence before it, drew inconsistent conclusions and inferences from the unchallenged

acts before it. Finding of Fact No. 12 concludes that appel-ant's negligence was "passive". Conclusion of Law No. 4 sserts that shipowner's negligence was concurring "and ent well beyond a mere passive act of negligence". (Other onclusions are to the same effect.) There was no evidence nd no finding to support this conclusion. Appellee suggests hat the characterization of appellant's negligence as pas-ve was a mere "descriptive phrase". But however the ndings and conclusions are described, it is evident that onflicting inferences and conclusions were drawn from the rimary, evidentiary facts.

CONCLUSION

Why should a stevedore company be in a position to shift he financial burden of an accident to a shipowner and avoid ayment of compensation and its other obligations, when has been guilty of deliberate and considered action which knew would cause injury and damage? Justice and equity s well as the law compel indemnity of a shipowner where stevedore callously proceeds with work in face of a nown and obvious danger in violation of both its express nd implied obligations to both the shipowner and its own mployees to perform work properly and safely.

The judgment below should be reversed and judgment ntered for $62,500 in favor of appellant and against ppellee.

Dated San Francisco, California, April 27, 1956.

Respectfully submitted,

LILLICK, GEARY, WHEAT, ADAMS & CHARLES
EDWIN L. GERHARDT
GORDON L. POOLE
Attorneys for Appellant